No. 2873.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

February Term, 1917.

JOSEPH PABLO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Montana.

Brief on Behalf of Plaintiff in Error

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and

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MISSOULIAN

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STATEMENT OF THE CASE.

The plaintiff in error, Joseph Pablo, was indicted by the United States grand jury for the District of Montana by an indictment containing three counts, each charging him with having, at the time stated, introduced intoxicating liquors upon the Flathead Indian Reservation in Montana; the first count being for about one quart of whiskey and on September 6th, 1915, the second count for about three quarts of whiskey on September 5th, 1915, and the third count for about four quarts of whiskey on October 5th, 1915.

To this indictment the defendant below entered a plea of not guilty, and the case came on regularly for trial before a jury on April 14th, 1916, at Missoula, Montana, the plaintiff and defendant below being represented by the counsel whose names now appear as the attorneys of record in this case.

Whereupon, testimony was introduced by and on behalf of the then plaintiff and defendant, and during the progress of the trial the defendant interposed various objections to evidence given and offered and took exception to various rulings of the court thereon and objected and took exception to other acts and omissions of the court, all of which will appear hereafter in this brief, and the questions involved and the manner in which they were raised and on which the plaintiff in error relies for a reversal of his conviction will be presented in

this statement of the case in the same numbered order as noted in the assignment of errors, also contained herein, and being as follows, to-wit:

I.

The plaintiff in error renews and again urges his general objection to the court's rulings in admitting and excluding evidence and as stated in the first, being the general specification of his assignments of error.

II.

The very first witness called by the plaintiff below was one Charles Hunter, and we here quote in full the proceedings that took place at that time and as appears by Tr. pp. 15-16:

"CHARLES HUNTER, being called as a witness, and being about to be sworn on behalf of the plaintiff, Mr. Besancon stated:

At this time we object to the witness being sworn to testify in this case upon the ground that he is incompetent to testify, having been convicted in this court of a felony, and judgment having been passed upon him in the month of February, 1914.

By Mr. Murphy: If the Court please, I have here a telegram pardoning the witness, and restoring him to citizenship.

By the Court: Well, they seem to have met the situation, Mr. Besancon.

By Mr. Besancon: Of course, we cannot question the telegram, but still we object to its being

received as evidence until the pardon itself is produced.*

By the Court: The pardon is an act of the executive of the United States, and when it is brought into this court, it is entitled to judicial notice without any proof at all. Of course, when it said the President has done a certain act, the Court must take notice of it. I think the telegram satisfies the Court, that it is so at this time. The objection will be overruled.

Exception taken by the defendant.

By the Court: As a matter of course, if there was any mistake, why, it would always be cause for setting aside a verdict, should there be one, or of any judgment; so no harm can be done in proceeding.

Thereupon CHARLES HUNTER was sworn as a witness on behalf of the Government, and testified as follows:

DIRECT EXAMINATION—BY MR. MURPHY.

*It was stated by the District Attorney that the telegram was from the Department of Justice that the President had pardoned the witness, Hunter, and the Court read the telegram.—B."

The examination of said Charles Hunter being allowed to proceed and, as will appear by Tr. pp. 17-26, said Hunter gave damaging testimony against the plaintiff in error, and the decisions of the court on the objections there made are here urged as error.

III.

On Tr. pp. 40 and 41 we find the testimony of one Andrew Gilbeau, a witness for the then plaintiff. After describing the course and direction taken by the defendant and those with the defendant such witness testified as follows:

> "When I was going that road I saw them drinking out of bottles. When we came back we got a number of bottles there. This was after we came back. Liquor, that is, whiskey, had been in the bottles. I could tell by smelling of the bottles. These we picked up right alongside of the track, right where I seen that they were breaking the bottles. It was a pint bottle and a big bottle. I picked up parts of them and could tell there was labels on them. I picked up one bottle."

By Mr. Besancon: We object to the witness testifying to the labels on the bottle. I think the witness said it looked like these pieces. The witness is not able to identify the bottle that he said he picked up.

By the Court: He can testify with reference to them, and you can cross-examine with reference to it. They are not bound to produce them. The objection is overruled.

(Exception noted by the defendant.)

The witness then proceeded to testify as to the label upon the bottle that he picked up, and further testified:

"I know it was a whiskey bottle and that whiskey was written on the label."

It being urged as error to allow this witness to testify as to the marks or labels upon the bottle and the writings upon such labels without making him produce the bottle or account for its absence.

IV.

As to the objections made and exceptions taken as found on Tr. p. 66, and being the foundation for the fourth assignment of error, although counsel for plaintiff in error believe there is merit to their position, still they are convinced that such errors, if any, there appearing are not sufficient grounds for the setting aside or reversing the judgment of conviction in this case and will not urge the same in this brief.

V.

On Tr. pp. 80 and 81 is found the testimony of one Harry Pritchett, a witness for the plaintiff in rebuttal. Such witness, after stating that he had seen the defendant, Joe Pablo, on the 5th or 6th of September at the hand game, near Arlee, further stated:

> "I didn't have any conversation with him at that time to amount to anything. I saw him there."

Q.—Well, what did you do, or what did he say to you, if anything?

By MR. BESANCON—We object to that, be-

cause he has already said that he had no talk with him, about anything.

By the COURT—His judgment of what amounted to anything may not be the same as the jurors'.

By MR. BESANCON—We object further upon the ground that it is not a proper impeaching question.

By the COURT—I know, but it may serve other purposes. You can always contradict the defendant on material matters. The objection will be overruled.

(Exception taken by the defendant.)

The witness then proceeded to testify as to remarks and statements made to him by the then defendant and to certain acts of the defendant. It will be noted that the defendant had never been examined relative to any conversation he may have had with such witness nor any meeting with such witness, and consequently these questions asked of the witness, Harry Pritchett, and the testimony obtained from him was absolutely new and the bringing out of new matter having no connection with nor bearing upon any testimony given, either by the defendant or by any of his witnesses.

VI.

On Tr. pp. 85 and 86 we find the following, which is here quoted in full:

Thereupon the counsel for the respective parties proceeded with the arguments to the jury, and during the argument Mr. Wheeler, United

States attorney, read to the jury a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by Mr. Wheeler was substantially the following (and as found at the top of page 91 of the transcript of evidence):

Q.—Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right, did you, before going to the hand game, go down to the Chinaman and get a bottle? A.—I believe I did, yes.

Whereupon Mr. Besancon objected to the reading of this part of the testimony by the district attorney unless he would also read the questions and answers following and as shown by the record.

By the COURT—Of course, he has the right to read the testimony. He is not obliged to read it all unless his own sense of what ought to be done suggests it to him.

To which ruling of the Court the defendant then and there duly excepted."

The above questions and answers being found in full in the testimony of the defendant on Tr. pp. 48 and 49, and we here quote the same in full, just as it appears in the record:

"Q. Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand

game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle? A. I believe I did, yes.

Q. Well, just tell us about that?

A. Well, I didn't see any whiskey there.

Q. What is that?

A. I didn't see anything there at all.

Q. You didn't see anything? A. No, sir.

Q. You didn't get any? A. No, sir.

Q. Well, did you see anybody get any at that time?

By the COURT—Did he answer you that he got a bottle of the Chinaman? Read the question to the witness.

Q. Did you, before going to the hand game, go down to the Chinaman and get a bottle before going to the hand game, did you see anybody get any whiskey at the Chinaman's?

A. No, sir."

We again call attention to the testimony of the defendant when being cross-examined by Mr. Wheeler and as found in Tr. p. 53, which is here quoted in full:

"I didn't get a bottle of whiskey at the Chinaman's. I had not obtained whiskey there before. I didn't say this morning that I got whiskey there at the other Chinaman's.

Q. Didn't Mr. Besancon ask you this morning if you had gotten liquor there at different times?

By the Court—Well, he did put sort of a double question to the witness, and asked him if he was not at the Chinaman's and got booze, and answered, I believe I was, I believe I did. Now, whether he was answering the first part of the question and told him he got the booze, or whether he was at the Chinaman's would be for the jury.

"I didn't get any whiskey at the Chinaman's at all. I saw no whiskey there and didn't have any drink at that place."

It will be noted from the above that such part of the testimony read to the jury by the district attorney when standing alone appeared to be an admission of guilt on the part of the defendant, which was intended to prejudice the minds of the jurors against the defendant and in showing to them conclusions from the testimony of the defendant that he admitted obtaining a bottle of liquor in the Chinaman's place just before starting on the automobile trip, while in fact all of the testimony of the defendant on such point was to the effect that he had not obtained any liquor there and had seen none there, etc.

The objections and exceptions there taken by the then defendant are here renewed, and it is here urged that such misconduct on the part of the prosecuting attorney was very prejudicial to the defendant.

VII

The then defendant requested the court to give

the jury four instructions, being found in Tr. pp. 84, 85.

Instruction numbered 1 requested by the defendant was as follows:

1. An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

This instruction was refused by the court, to which the defendant duly excepted, and such refusal is here urged as error.

VIII.

The defendant also requested the court to give his instructions numbered 2, found on Tr. p. 84.

Instruction numbered 2 so requested by defendant was as follows:

You are instructed as a matter of law, that if you believe from the evidence that the witness, Lawrence Pritchett, actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.

This instruction was refused by the court, to which the defendant duly excepted, and here urges that such refusal was error.

IX.

The then defendant also requested the court to give the jury his instruction numbered 3, found on Tr. p. 85.

Said instruction numbered 3 so requested by the defendant was as follows:

The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witnesses; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

This instruction was by the court refused, to which the defendant duly excepted, and such refusal is here urged as error.

X.

The then defendant also requested the court to give the jury his instruction numbered 4, found on Tr. p. 85.

Said instruction numbered 4 so requested by the defendant was as follows:

Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still, this is not sufficient to convict the defendant unless you further find, beyond a reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and

in this way introduced by him into the Flathead Indian Reservation.

Said instruction was by the court refused, to which the defendant duly excepted, and such refusal is here urged as error.

XI.

It will be noted that after the refusal of the court to give the defendant's requested instructions 1, 2 and 3, bearing on accomplices, their testimony, and the fact that the witness, Lawrence Pritchett, was an accomplice, the court then, in its instruction (Tr. p. 93) instructed the jury as follows:

As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice.

Counsel for the defendant excepted to the failure of the court to give the defendant's proposed instructions 1 to 4, and we believe in so doing properly excepted to the above court's instruction, which has the opposite effect to that which was requested and as will be pointed out in the argument hereafter. The witness, Lawrence Pritchett, was an accomplice and the defendant was not only entitled to an instruction to that effect, but certainly the giving of an instruction to the effect that Pritchett was not an accomplice is error and very prejudicial to the defendant.

The jury found the defendant guilty in the man-

ner and form as charged in Count 3 of the indictment and not guilty as to Counts 1 and 2. (Tr. p. 8.)

The plaintiff in error, Joseph Pablo, appeared in court in his own proper person and by his counsel, the court being about to pronounce sentence and judgment upon the defendant, and moved the court to arrest the judgment and assigned five reasons therefor in his written motion in arrest of judgment. (Tr. pp. 95, 96.)

The motion in arrest of judgment was denied, to which ruling of the court the defendant then and there duly excepted, and the court then sentenced the defendant to imprisonment in the county jail of Missoula County, Montana, for the term of seventy-five days and to pay a fine of $100 and costs, which costs were taxed at $294.10, and that he be confined in said county jail until said fine and costs were paid or otherwise discharged according to law, and judgment was duly entered thereon (Tr. pp. 9, 10), to which judgment and sentence the defendant then and there duly excepted.

Thereupon the defendant interposed a motion for a new trial, setting up nine grounds of error (Tr., pp. 97 to 98) and after the hearing thereon the motion for new trial was by the court overruled, to which the defendant duly excepted.

A bill of exceptions was prepared, allowed, settled and signed, which is set forth in the transcript in this case. (Tr. pp. 11 to 100 inclusive.)

Whereupon the defendant below sued out a writ of error to this court and specified the following:

ASSIGNMENTS OF ERROR.

The defendant in this action, in connection with his petition for a writ of error, and after the denial of his motion for a new trial, specifies and makes the following assignments of error, which he avers exist:

1. The Court erred in admitting certain evidence over the defendant's objections thereto and excluding certain evidence excepted to by the defendant at the time of the trial, as follows, to-wit:

2. The Court erred in allowing the witness, Charles Hunter, to testify, and in overruling the objections of the defendant on the ground that said Hunter had been convicted of a felony and in accepting the telegram as evidence that said witness had been pardoned and restored to citizenship.

3. The Court erred in allowing the witness, Andrew Gilbeau, to testify relative to the kind of bottles which he picked up and the particular labels upon the same, and this without requiring the said witness to produce the said bottles and labels or account for them.

4. The Court erred in allowing the following question to be asked of the witness, Philip Hull, and answered on cross-examination:

Q. Who was with you when that was cached the day before that?

5. The Court erred in allowing the following

question to be asked the witness, Harry Pritchett, and answered:

Q. Well, what did you do or what did he say to you, if anything?

6. The Court erred in permitting the United States attorney in his argument to the jury to read to them a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by said attorney was substantially the following:

Q. Well, now, if I had this right, the witness that mentioned it said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle?

A. I believe I did, yes.

And this without requesting said district attorney to read the questions and answers following the above and of said witness and as shown by the record.

7. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

8. The Court erred in refusing to give to the

jury the following instruction requested by the defendant:

You are instructed as a matter of law, that if you believe from the evidence that the witness, Lawrence Pritchett, actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.

9. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

10. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still, this is not sufficient to convict the defendant unless you further find, beyond a

reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and in this way introduced by him into the Flathead Indian Reservation.

11. In connection with the Court's refusal to give the defendant's proposed instructions relative to the witness, Lawrence Pritchett, being an accomplice, the Court further erred in instructing the jury, in regard to said witness, Lawrence Pritchett, in the following language, to-wit:

"As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice."

12. The Court erred in holding the evidence sufficient to warrant the jury in finding the defendant guilty.

13. The Court erred in denying the motion of the defendant in arrest of judgment.

14. The Court erred in passing sentence upon the defendant.

15. The Court erred in overruling the defendant's motion for a new trial.

ARGUMENT.

I.

The Court erred in allowing the witness, Hunter to testify and in overruling the objections of the defendant on the ground that said Hunter had been

convicted of a felony and in accepting the telegram as evidence that said witness had been pardoned and restored to citizenship. Tr. pp. 15 and 16.

Fourth As. of Error.

It will be observed that at the trial two things were conceded: first, that the witness, Hunter, had been convicted in said court of a felony, and judgment had been entered against him in the month of February, 1914, thus making him incompetent to testify; second, that to remove the objection of his conviction a telegram was offered by the Government purporting to show that the said witness, Hunter, had been pardoned by the President, and the court being satisfied with the evidence offered over the defendant's objections allowed the witness to testify.

The competency of one convicted of a felony to testify is only restored by full and complete pardon.

Boyd *vs.* U. S., 142 U. S. 450.
Logan *vs* U. S., 144 U. S. 303.
U. S. *vs.* Hughes, 175 Fed. 238.
Yarborough *vs.* State, 41 Ala. 405.
People *vs.* Bowen, 43 Cal. 439.
Id. 13 Am. R. 148.
Singleton *vs.* State (Fla.), 34 L. R. A. 251.
Thompson *vs.* U. S., 202 Fed. 401.
Id. 120 C. C. A. 575.
Id. With extensive note, 47 L. R. A. N. S. 206.
Osborne *vs.* U. S., 91 U. S. 474; 95 U. S. 153.

A limited pardon does not restore the competency of a witness convicted of a felony.

State *vs.* Timmons, 2 Hawr. (Del.) 259.
Perkins *vs.* Stevens, 24 Pick. 277.
Carr *vs.* State, 19 Tex. App. 463.
Id. 53 Am. Rep. 395.

The pardon must be proved by the producton of the charter of pardon under the Great Seal.

1 Wig. on Ev., Sec. 523, Sub. 2.
U. S. *vs.* Jones, 2 Wheeler C. C. 451.

While the disability now under discussion may be removed either by the granting of a pardon or by the reversal of the judgment, yet the proof of such pardon or reversal *must* be by the proper documentary evidence under the general rule that the best evidence must be produced.

Jones on Evidence, §718.

"It would follow that if a judgment appears to have been rendered the party offering the witness must show that it has been reversed or the offence pardoned."

1 Wig. on Ev. Sec. 521. Note citing.
State *vs.* Howard, 19 Kans., 507, 509.
State *vs.* Clark, 60 Kans., 450; 56 Pac. 767.

When Hunter was produced as a witness he stood a convicted felon in said court and as appeared by the record of the court then produced. It seemed to be admitted by the prosecution as also by the court, that the witness had been legally convicted and that such a judgment stood against him in that same court. No showing of any kind was made that the pardon granted Hunter was full and complete, nor what the nature or the effect of the same

might be. A telegram was produced by the district attorney and the statement made by him that the telegram was from the Department of Justice and that the President had pardoned the witness Hunter and the Court read the telegram. (Tr. p. 16.)

In the case of Singleton *vs.* State of Florida, 34 L. R. A. 251, the state introduced one Howard Bishop, who had been convicted of a felony, as a witness and to testify to material and damaging facts against the accused. In the language of that court:

"It is not deemed necessary to set out the testimony of the witness as there can be no doubt that it bore directly on defendant's guilt, was calculated to influence the jury and if improperly admitted was harmful and cannot be considered otherwise than as reversible error."

"BEST EVIDENCE," "PRODUCTION."

The third assignment of error (Tr. p. 101) is as follows:

3. The Court erred in allowing the witness, Andrew Gilbeau, to testify relative to the kind of bottles which he picked up and the particular labels upon the same, and this without requiring the said witness to produce the said bottles and labels or account for them.

In the consideration thereof we will quote a part of the testimony of the witness, Gilbeau, prior and leading to the objection then made. (Tr. pp. 40-41):

"When I was going that road I saw them drinking out of bottles. When we came back we got a number of bottles there. This was after we came back. Liquor, that is whiskey, had been in the bottles. I could tell by smelling of the bottles. These we picked up right alongside of the track, right where I seen that they were breaking the bottles. It was a pint bottle and a big bottle. I picked up parts of them and could tell there was labels on them. I picked up one bottle."

By Mr. Besancon: We object to the witness testifying to the labels on the bottle. I think the witness said that it looked like these pieces. The witness is not able to identify the bottle that he said he picked up.

By the Court: He can testify with reference to them, and you can cross-examine with reference to it. They are not bound to produce them. The objection is overruled.

(Exception noted by the defendant.)

The witness then proceeded to testify as follows:

"As to the kind of bottle, it was one of those pint bottles: it was a big bottle, a flask, and it had a label on. The label had never been broken off the bottle. I didn't notice what make it was. I know it was a whiskey bottle and that whiskey was written on the label."

By a fair construction of the above testimony it will be seen that although the statements of the witness are somewhat conflicting, still, as a whole, he testified as to having picked up one bottle and that he read the label on the bottle and that there was writing on the label and from such writing he determined or assisted in determining the contents of the bottle. The testimony

also shows that the bottle was in the witness' possession, at least after he picked it up. Nothing appears as to where it may have been at the time of the trial, and by the ruling of the Court the prosecution was excused from producing the bottle and the label and giving any reason for its non-production.

The plaintiff in error contends that the label was a writing and the best evidence of its contents and that it should have been produced or accounted for, and that it was error to allow the witness to testify as to the words or contents of the writing on the label without producing it or accounting for it.

This will be treated under the "Best Evidence" rule, and we know of no authority that has treated this question more extensively than Wigmore on Evidence in Vol. II., beginning at §1171. In §1175 of the same volume we find that the rule prefers the thing itself to any evidence about the thing.

At §1178 of the same volume we quote the following:

> "The rule may be stated, for convenience in examining its details and distinctions, in the following parts: (a) in proving a writing, (b) production must be made, (c) unless it is not feasible, (d) of the writing itself, (e) whenever the purpose is to establish its terms."

In the case at bar the label was unquestionably a "writing." In II. Wig. §1183 and under the

above subdivision "a" we find the definition and rule as to what is considered documents or writings, and we quote such section here in full:

> "Sec.1183. RULE APPLICABLE TOALL KINDS OF WRITINGS. When the thing in question comes strictly within the class commonly termed 'documents' or 'writings,' i. e. things of paper or parchment employed solely as a material for bearing words written or printed in the form of complete clauses or sentences expressing connected thought, there is no further distinction to be made. The rule is applicable to all kinds of writings. The original doctrine of profert affected only records and instruments under seal, and applied in civil cases only; but by a gradual development, already noticed (ante, §1177), the rule requiring production in evidence came to be settled, by the 1700s, as including in its scope any and every kind of document, from a record or a deed to a letter or a memorandum, and as applicable equally in criminal and in civil cases."

Under "b", "Production", we quote a part of §1186:

> "The rule is that production *must* be made; it says nothing, in itself, as to whether production *may* be made."

Under subdivision "c" id. Vol. §1192, we quote such section:

> "§1192. General Principle; Unavailability of the Original; Proof to the Judge. (1) The essential principle of preferred evidence is that it is to be procured and offered if it can be had (ante. §1172). That thought dominates both the present rule preferring production of the document itself and the ensuing class of rules preferring one kind of

> witness to another kind (post, §1286). The thought is here not that a certain kind of evidence is absolutely necessary, but that a certain kind is to be used if it is available. If it is not available, then it is not insisted upon."

Under subdivision "d" relative to the production of the writing itself, beginning the same volume §1231, we find a comprehensive discourse on what must be produced.

Under subdivision "e", "Whenever the purpose is to establish its terms," beginning at §1242 of the same volume, we find this subject fully and elaborately discussed.

Our contention is that nowhere in the rules of evidence have we found any authority, under circumstances such as arose in this case, that would allow a witness to state that a writing came into his possession and over objection be allowed to testify as to the contents of such writing and as to the words and figures, etc., contained upon the same without producing the original or accounting for it in some satisfactory manner that would allow secondardy evidence of its contents.

WAIVER.

IV.

For the reasons given in Part IV of the statement of the case as contained in this brief no argument is advanced on the fourth assignment of error.

IMPEACHMENT.

V.

The testimony and objections relating to the witness Harry Pritchett is found at Tr. pp. 80, 81, also in Part V of the preceding statement of the case and forms the basis of the fifth assignment of error. The testimony and objections will not be repeated here.

We particularly call attention to the objections of the then defendant on the ground that the question asked such witness was not a proper impeaching question and the ruling of the court conceding this position and stating that the testimony might serve other purposes and the further statement of the court, "You can always contradict the defendant on material matters."

It is clear from the testimony given by the witness Harry Pritchett that the prosecution then desired to bring forth a new line of testimony against the defendant. It could not have been to contradict the defendant on material matters. We cannot find in the record that the defendant had testified that he did have or did not have liquor at that particular hand game. The question asked of the witness was big and broad enough to allow such witness to testify to entirely new facts which might be the basis of an entirely new charge or offence against the defendant.

> "To contradict the defendant on material matters he must have testified to such matters."

Vo. II Wig. on Ev., §1000, *et seq.*

It certainly was not proper to attempt in rebuttal to charge the defendant with another and distinct offence and by this process of elimination we cannot see any other purpose or object for this testimony than an attempt to impeach the defendant, showing that regardless of his former declarations and statements that he, the defendant, did have liquor on or about him at a particular time and place and if this was the purpose then we fail to find in any examination of this defendant any testimony of his that would justify such an attempt to impeach him.

It seems the prosecuting attorney did ask the defendant whether he knew Harry Pritchett, Lawrence's brother, and he answered that he did and had seen him a few times (Tr. p. 56). This, of course, did not constitute a proper and necessary preliminary warning that should have been given to the defendant before inquiring of the witness Harry Pritchett. (Vo. II Wig. on Ev. §1025.)

For these reasons we believe that the objection to the testimony to be given by such witness Harry Pritchett should have been sustained, and as will appear by the record (Tr. p. 81) such witness gave very damaging testimony against the defendant such as would tend to prejudice him in the minds of the jurors.

MISCONDUCT.

VI.

The plaintiff in error again calls the court's attention to his sixth assignment of error (Tr. p. 102) and the testimony relative to the same (Tr. pp. 48-53 and 86), all of which testimony, the objections to the reading of the part thereof by the prosecuting attorney and the exceptions to the ruling of the court, are fully set forth in Part VI of the statement of the case in this brief.

We have examined the transcript notes of the court stenographer and the original bill of exceptions, as well as the transcript in this case, and do not find therefrom any mention as to whether such part of the testimony was read by the United States attorney in his opening or closing remarks to the jury. However, the fact is that this was done in the closing argument by the attorney, and we do not think the government will contend otherwise, and being in his closing argument there was no possible chance for the attorneys for the then defendant to refute the same in argument.

We contend that in thus placing before the jury a part of the testimony of the defendant which part contained an admission of guilt while if all of the testimony had been read the exact opposite would have been shown, constituted misconduct on the part of the prosecuting attorney, and further, that the ruling of the court at such time precluded any further objection and any request to

have the court caution the jury to disregard such alleged misconduct of the prosecution.

The reading of a part of the testimony showing one meaning although it is a correct reading of this part, still constitutes a misstatement of the testimony, and here the prosecution by its conduct compelled the defendant to be a witness against himself and the jury were told that the defendant had admitted his guilt when, as a matter of fact, no such inference nor conclusion could be drawn from all of the testimony. (Art. V. Amd. to U. S. Constitution.)

> "A prosecutor in a criminal trial has no right in arguing a cause, to state as a fact any matter not borne out by the testimony."
>
> Palin *v.* State (Neb.), 57 NW. 746.
>
> "A defendant claiming that the prosecutor is not correctly quoting his testimony to the jury should request that all of the testimony be read and the court should request this to be done."
>
> Stuckey *vs.* Fritsche (Wis.), 46 N. W. 60.

In the case at bar it will be noticed that the court left this as a matter optional with the prosecution as to how much or what part of the testimony he might use or read. This certainly was error as it was a matter within the power and control of the court.

We believe our objection was timely and well taken.

(Abbotts Cr. Tr. Brief 601.)

"It is error to allow the prosecuting attorney, against defendant's objections, to argue from facts not in evidence."

Abbotts Cr. Tr. Brief 606.
People *v.* Mitchell, 62 Cal. 411.

"When the prosecuting officer has indulged in argument not supported by the record or makes use of unfair or prejudicial statements, either in argument or the examination of witnesses, or at any other time in the presence of the jury, the defense should at once object, and thereupon it becomes the duty of the court to instruct the jury not to consider what the prosecuting officer has said and the remarks or argument or statement should also be withdrawn by the prosecuting officer."

Atwells Fed. Cr. Law §22a. Citing:
Higgins *vs.* U. S., 185 Fed. 710.
Donaldson *vs.* U. S., 208 Fed. 4.
Steward *vs.* U. S., 211 Fed. 41.
Fish *vs.* U. S., 215 Fed. 545.
L. R. A. 1915-A 810.
And others.

"The situation made by the prosecuting attorney was under the circumstances highly improper and not having been withdrawn, and the objections to it being overruled by the court it tended to prejudice the rights of the accused to a fair and impartial trial."

Williams *v.* U. S., 168 U. S. 382.

See also:
Hill *vs.* U. S., 150 U. S. 76.
Lowdon *vs.* U. S., 149 Fed. 677; 46 L. R. A. 641-653.

"The fact that the district attorney states some portion of the evidence erroneously or makes exaggerated statements as to its strength is not error unless it is clear to

the court that the accused was prejudiced thereby."

12 Cyc. 575 and cases cited.

However, it certainly cannot be contended that the intent, purpose and effect of the prosecution reading such part of the defendant's testimony did prejudice the defendant and, in fact, place him before the jury as a confessed and admitted criminal.

We find that this court seriously considered the question of the misconduct of the prosecuting attorney in the Diggs case, 220 Fed. 556 and in such decision cited:

People *v.* Shears (Cal.), 65 Pac. 295.
People *v.* Babcock (Cal.), 117 Pac. 594.
Dunlop *vs.* U. S., 165 U. S. 486.
Chadwick *vs.* U. S., 141 Fed. 225-245.

We quote from Mr. Justice Lurton in the Chadwick case above cited:

"But when facts not in evidence are stated to the jury, or arguments advanced plainly not justified by the evidence, and calculated to arouse prejudices incompatible with even-handed justice or an orderly course of procedure, it is the right and privilege of the counsel for the accused to object and ask the interference of the court and to except when the court denies the appeal. But to entitle the accused to a reversal when objection is made and the language not withdrawn it must appear that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused."

Citing the Dunlop case, and also:
Kellogg *vs.* U. S., 103 Fed. 200, 43 C. C. A. 179.

INSTRUCTIONS—ACCOMPLICES.
VII, VIII, IX AND XI.

This part of the brief has reference to the instructions requested by the defendant, being numbers 1, 2 and 3 (Tr. pp. 84, 85) set forth fully in the statement of the case in this brief under paragraphs VII, VIII and IX and being under the same numbers in the assignments of error, and also to the instructions given by the court relative to the witness Lawrence Pritchett found at Tr. p. 93, also the 11th assignment of error (Tr. p. 103) and Part XI of the statement of the case in this brief. The failure to give the first three instructions above noted and the giving of the fourth constituting the error complained of.

It will be noted in this case that the defendant was found guilty on Count Three of the indictment, said Count Three being set forth at Tr. pp. 13 and 14, being based on what took place on the 5th day of October, 1915, and all the facts connected therewith and alleged to have occurred on the trip of the defendant and others from the city of Missoula to the Flathead Indian reservation.

From a consideration of the entire testimony in this case we believe it will be noted that the prosecution relied almost wholly upon the testimony of the two witnesses Charlie Hunter and Lawrence Pritchett, and without such testimony no conviction would have resulted nor could be sustained. It is even difficult to find anything corroborating

the testimony of those two witnesses; so we have almost concluded that the testimony of such witnesses convicted the defendant.

As to the witness Hunter, the record of a former conviction stood against him to affect his credibility and the court commented on this in his instructions (Tr. p. 89) and also in the same instruction (Tr. p. 92) the court commented on the fact of Hunter taking part in the occurrences and that he might be an accomplice, and although not declaring him such still we believe the jury could infer from the remarks of the court that Hunter was placed in such position and that his testimony should be weighed accordingly. So the failure to give the instructions above noted and the giving of the instruction of the court are to be considered in reference to the witness Lawrence Pritchett.

For convenience we will again quote the instructions requested and refused by the court, being numbered by the then defendant 1, 2 and 3, and in the following language:

1. An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

2. You are instructed as a matter of law, that if you believe from the evidence that the witness Lawrence Pritchett actually committed or assisted or participated in the commission of the offence

charged in the indictment, then he is an accomplice.

3. The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you. (Tr. pp. 84, 85.)

And we again quote the instruction given by the court with reference to the witness Lawrence Pritchett:

> "As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice." (Tr. p. 93.)

We believe the definition of an accomplice is well stated in 12 Cyc. 445, in the following language:

> "The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offence for which the accused is being tried." Citing:
>
> People *vs.* Collum, 122 Cal. 186; 54 Pac. 589.
>
> State *vs.* Jones, 115 Iowa 113; 88 N.W. 196.
>
> Territory *vs.* Baker, 4 N. M. 236; 13 Pac. 30.

The above definition being cited by this court in

Diggs *vs.* U. S. 220 Fed. 545.

"Whether a witness is an accomplice is a question of fact to be determined by the jury under instruction from the court as to the law."

12 Cyc 446, citing 12 Cyc 449j, in the following language:

"The question whether the participation of the witness in the crime makes him an accomplice is one of fact for the jury to determine from all the circumstances, both under instructions from the court as to the necessity for the criminal intent and other elements which are necessary to constitute one an accomplice."

Again citing:

People *vs.* Compton, 123 Cal. 403; 56 Pac. 44.

People *vs.* Curlee, 53 Cal. 604.

State *vs.* Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

The above definition is accepted and approved by the following decisions:

Stone *vs.* State, 118 Ga. 705; 45 SE. 630.

State *vs.* Duff, 144 Ia. 142; 122 N. W. 829.

State *vs.* Gordon, 105 Minn. 217; 117 N. W. 483.

State *vs.* Douglas, 26 Nev. 196; 65 Pac. 802.

State *vs.* Durnam, 73 Minn. 165; 75 N. W. 1127.

Dunn *vs.* People, 29 N. Y. 523; 86 Am. Dec. 319.

Sanches *vs.* State, 48 Tex. Crim. 591; 90 S. W. 641.

Other definitions of accomplice following:

"An accomplice is one who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime." Jones on Ev. §768.

"To constitute an accomplice he must have participated in the criminal intent." Abbott's Crim. Tr. Brief, 622.

"According to some definitions the word 'accomplice' includes all persons who participated in the commission of the crime, whether they do so as principals or aiders and abettors before the fact."

Ledering *vs.* Com. 132 Ky. 666; 117 S.W. 253; 136 A. S. R. 192.
Also Note 2, 138 A. S. R. 274.
State *vs.* Duff, 122 N. W. 829.
See also 21 L. R. A., N. S. 878.
People *vs.* Coffey, 161 Cal. 433; 119 Pac. 901.
Cross *vs.* People, 47 Ill., 152; 95 Am. Dec. 474.
McClain Crim. Law, §§195-203.

"Whether or not a witness is an accomplice is, generally speaking, a question of fact for the jury."

People *vs.* Kraker, 72 Cal. 459; 14 Pac. 196.
State *vs.* Keller, 8 N. D. 563; 80 N. W. 476.
Driggers *vs.* U. S., 21 Okl. 60; 95 Pac. 612.
Williams *vs.* State, 33 Tex. Crim. 128; 25 S. W. 629.
Porath *vs.* State, 90 Wis. 527; 63 N. W. 1061.

Tested by the above rules and weighed accordingly the question arises as to whether or not Lawrence Pritchett was an accomplice. We unquestionably believe that he was an accomplice, and

was proven so by nearly all of the witnesses who testified in this case. We wish to call the court's attention to some of this testimony and will briefly comment on it with the transcript page where found:

He was with Hunter, the defendant, and others at Missoula before they started on the trip, and went with Hunter to secure some whiskey at the Frog Pond (Tr. p. 17). He got into the car with the others and when Hunter says "The two pints we got at the Montana Bar" Lawrence Pritchett was with him. Lawrence sat in the hind seat with Hunter (Tr. p. 18). They were all pretty near drunk, Lawrence and the others. Lawrence and the others had drinks at Couture's place (Tr. p. 19). Again, Lawrence went with Hunter to the Frog Pond and with him to the Montana Bar; at both places liquor was secured (Tr. p. 22). Somebody got out and picked up a bottle a few miles out of Missoula (Tr. p. 24). The witness Stephens thinks it was Pritchett that got out of the car where he got something and brought it back with him (Tr. p. 28). Again, from Pritchett's own testimony, he says when they picked up a quart bottle along the road it had a paper around it and they took the paper off and put it under the back seat (Tr. p. 31). Again, he and the others had a drink at Couture's place (Tr. p. 32). Again, on another trip on the reservation, Lawrence sat in the back seat of the car with others and the bottle

was passed from there (Tr. p. 37). Again, at Blue-eyed Mary's place on the reservation Pritchett took a bottle and passed it around (Tr. p. 39). Again, Lawrence went out in the brush and got a bottle and passed it around (Tr. p. 46). At the hand game Lawrence brought some over and seemed to have a cache in a hay stack somewhere and furnished the same to whoever wanted it (Tr. p. 47). Again, Lawrence asked to stop the car in Missoula and four or five miles out of town again asked to stop, where he went out to a fence. Later he pulled out a bottle and passed it around (Tr. p. 50). Again, he invited the party over to Blue-eyed Mary's place, where he, Lawrence, had a quart or a pint of whiskey (Tr. p. 54). Lawrence asked them to stop at the Montana Bar (Tr. p. 55). After they got out of town Lawrence passed a bottle around (Tr. p. 55). He asked them to stop a short distance out of town where he got out and went over to a fence for something (Tr. p. 55). Lawrence said he had a cache and went and took it out himself and passed the bottle around (Tr. p. 56). Lawrence had some whiskey at Blue-eyed Mary's place (Tr. p. 57). Lawrence and Hunter got out of the car and went up the street, where they were found in a saloon drinking at the bar, and that is the saloon where the liquor was obtained (Tr. p. 61). About four miles out of Missoula Lawrence jumped out and got a bottle that had been left there the day before (Tr. p. 62). This bottle of

whiskey had been cached there by members of the same party the day before (Tr. p. 66). Another witness saw Lawrence hand a bottle to Joe on the reservation, having obtained it around a stack (Tr. p. 74). Lawrence had some liquor the day at the hand game (Tr. p. 84). Together with all of the other testimony in the entire transcript which connects Lawrence Pritchett with the obtaining, handling and giving of whiskey and liquor when off the reservation and on the reservation and when in company with the defendant and others.

We are not unmindful of the rule followed in criminal trials in the federal court to the effect that a trial court is not required to caution juries not accepting the evidence of an accomplice without material corroboration, etc., although this seems to be the rule in practically every state court. To quote Judge Archibald in Richardson *vs.* U. S., 181 Fed. 1:

> "No doubt there is a well established practice, sanctioned by long practice and judicial approbation, to caution jurors about accepting the evidence of an accomplice without material corroboration, coming, as it does, from a polluted source, but this is as far as the matter goes."

In the above action Judge Archibald cited:

> Holmgren *vs.* U. S., 272 U. S. 509.
> Id. 30 Sup. Ct. 588.

These cases are also cited by the decisions in this court:

Lung *vs.* U. S., 218 Fed. 817.
Diggs *vs.* U. S., 220 Fed. 545.

"So manifest is the danger of convicting a man on evidence from a source confessedly corrupt and delivered by the witness to shield himself from merited punishment that the judges, while explaining to the jurors their right to convict, by way of caution advise them not to return a verdict of guilty unless it is corroborated by evidence from a purer source; yet they are not as of law required to give this advice."

Atwell's Fed. Crim. Law §42b. Citing:
Bishop New Crim. Proc. 2nd Vol., §1169.

It should not be overlooked in this case that the witness Lawrence Pritchett was impeached for truth and veracity by the witnesses Archie Grant (Tr. p. 78), Mrs. Couture (Tr. p. 77) and Frank Kirkpatrick (Tr. p. 78). And this, in connection with his participation in the criminal acts, did not make him a pure and credible witness.

We believe the instructions offered should all have been given, and especially 2, relative to the witness Pritchett, and that it was error on the part of the court not to give these instructions. However, for the court to instruct the jury that Lawrence Pritchett was not an accomplice in the opinion of the court and to cite to the jury one instance of Pritchett standing by and taking no part when the liquor was passed in substantiation thereof placed this witness before the jury as not only not an accomplice but as a witness entitled

to full credit; in other words, a witness who is pure and not charged with any wrongful participation in the offence and entitled to full credit as such. In doing this we believe the court committed reversible error, for, as already stated, the evidence to support a conviction of the defendant on the Third Count rested upon the testimony of Hunter and Pritchett and the court could not single out one of these witnesses and absolve him of all wrongdoing without serious prejudice to the defendant.

Lawrence Pritchett certainly could have been indicted on all three of the counts charged against the defendant and could have been convicted on each and all of these counts. Pritchett and Hunter were the leaders and instigators during practically all of the occurrences that led up to these charges and both should properly have been charged with the crime, whether the then defendant was so charged or not.

KNOWLEDGE—INSTRUCTION.

X.

We wish to briefly call attention to the defendant's requested instruction No. 4 (Tr. p. 85) set forth in full in Part X of the statement of the case in this brief. This requested instruction was also refused by the court. We believe that the instruction was proper. Certainly the defendant should not and could not have been properly convicted on the third count unless he knew or as a reasonable

person should have known that liquor was being conveyed in his machine and in that way introduced into the Flathead Indian reservation.

It will be noted that the court, in its instructions to the jury (Tr. p. 93), did instruct on this phase of the case. However, in the instruction to the jury the court laid particular stress on the fact that if the liquor was Hunter's and the defendant knew nothing about it he, the defendant, would be guiltless, and every time the court approached this subject in the instructions it was to single out Hunter and the fact that Hunter might have placed it or had liquor in the automobile. Our contention is that the instructions as requested which referred to all persons riding in the automobile and whether or not they had any liquor, should have been given to the jury or the jury should have been charged substantially to the same effect.

Although there is plenty of testimony to the effect that Hunter placed liquor in the machine and had it there, there is likewise a large amount of testimony that Lawrence Pritchett did the same, and there is also testimony that Charlie Stephens and other passengers had some liquor. The charge to the jury was not comprehensive enough to include all of the persons riding in the machine and for that reason was erroneous and left with the jury the impression that the defendant was guilty, except in the one instance, and that

would be when Hunter had the liquor and the defendant had no knowledge of this fact.

CONCLUSION.

XII, XIII, XIV, XV.

We therefore respectfully submit that the defendant was not given a fair and impartial trial to which he was entitled under the law and the rules of evidence. That all of the evidence in the entire case was not sufficient to warrant the jury in finding him guilty. That his motion in arrest of judgment should have been sustained. That no sentence should have been passed upon him and no judgment entered against him, and when this was done that his motion for new trial should have been sustained. For the manifest errors of the court below and all as set forth in this brief the conviction and judgment against the plaintiff in error should be set aside and this case should in all things be reversed.

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Dated: January 6th, 1917.